

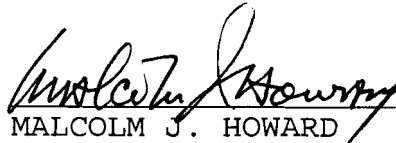


See United States v. Harp, 406 F.3d 242 (4th Cir. 2005); United States v. Jones, 195 F.3d 205 (4th Cir. 1999). However, defendant contends that the Supreme Court's more recent decisions in United States v. Rodriguez, 553 U.S. 377 (2008), and Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010), overrule Jones and Harp, and compel the conclusion that the maximum term of imprisonment for a conviction under North Carolina's Structured Sentencing Act must be determined according to the particular defendant's prior record level.

Since the filing of defendant's motion, the Fourth Circuit has reaffirmed that whether an offense is punishable by imprisonment for more than one year is determined by looking at "the maximum aggravated sentence that could be imposed upon a defendant with the worst criminal history category for that offense," and not the maximum sentence that could be imposed upon a particular defendant based on his prior record level. See United States v. Simmons, No. 08-4475, slip op. at 11 (4th Cir. Feb. 16, 2011) (rejecting, upon remand from the Supreme Court, argument that Carachuri-Rosendo overruled Fourth Circuit's decisions in Jones and Harp). The mandate has not yet issued in Simmons, and that decision may not be binding precedent at the present time; however, Jones and Harp are.

In this case, there is no question that defendant has previously been convicted of offenses that are punishable by imprisonment for more than one year under the Fourth Circuit's reasoning in Jones, Harp and Simmons. Accordingly, defendant's motion to dismiss [DE #19] is DENIED.

This <sup>25<sup>TH</sup></sup>~~24~~th day of February 2011.



MALCOLM J. HOWARD  
Senior United States District Judge

At Greenville, NC  
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